Statement Regarding HBs 5154-55 – March 4, 2014
Submitted by Bruce A. Timmons

Context for HB5154 (H-1) as Passed by the House:

Is this version better than proposed in 2005 by Attorney General Cox? Yes.

Is this version better than HB 5154 as introduced? Yes.

Are pre-exam conferences of today a good idea? If done right, yes.

In particular the bill would no longer allow (and it may never have been intended) a non-attorney district court magistrate to take testimony of a victim at a probable cause conference. This bill and HB 5155 would not expand the authority of district court magistrates to accept pleas or impose sentences beyond what they can do today. The bill now allows only video-recorded testimony at a preliminary exam to be used later at trial, not audio or telephonic recordings. It clarifies the admissibility of lab and other reports. Most of the changes, which reflect accommodation between PAAM and CDAM, relate to the preliminary exam. The bill also added an effective date (Sep. 1) and spelled out the intended definition of "victim". All good.

History:

HB 5154 would provide for a "probable cause conference" ahead of the preliminary examination in felony cases. One should keep in mind that for 150 years Michigan has used a preliminary examination in lieu of a grand jury to determine whether there is a legal basis (probable cause) for a person accused of a felony to stand trial in the circuit court. One of the considerations for the Committee is whether the proposed legislation facilitates the function of the preliminary examination or undermines its historic purpose to weed out cases that do not belong in circuit court.

In 2005 Attorney General Mike Cox proposed the virtual elimination of the preliminary examination. Circuit judges and district judges united to oppose that legislation because they believed it would result in inappropriate cases being brought in circuit court where the evidence was insufficient to justify submitting an individual to the loss of reputation, expense, and consequences of a felony trial or where the evidence better substantiated a lesser offense within the jurisdiction of the district court.

HB 5154 is an outgrowth of the 2005-06 effort. During the earlier debate, there was substantial interest in expanding the use of "pre-exam conferences" which several jurisdictions were using with reported success at avoiding the cost, inconvenience, inefficiency, and gamesmanship that the preliminary examination process often engendered.

Pre-Exam Conferences – the Current Forerunner of "Probable Cause Conferences":

Who uses these now and how effective are they? I suggested to SCAO in December that they ought to do a survey of district courts as to which jurisdictions were using some variations of pre-exam conferences (PECs). The response I received was a little puzzling: "While this information might be of interest, it will not alter whether HB 5154 reflects a good public policy change. The bill will either require these conferences, intending to reduce the number and burden of preliminary exams, or it will not."

In 2011-12 the mantra of the Supreme Court and SCAO was "best practices". I can think of no issue pending before the Legislature this Session and affecting the court system that lends itself more to a "best practices" analysis than HB 5154. Yet SCAO seems to think current practices (what works or doesn't work) are irrelevant and that ***you*** don't need to know that. Why is the highest court in the state so disinterested in legislation that affects every district court, if not each circuit court, in this state – because other powerful interests have essentially advised them to stay on the sidelines and they are choosing to do so?

If the result is preordained, why let facts obstruct the view?

Some of us still think that facts and experience matter.

In lieu of a more authoritative survey, I sent my own email survey to several district judges, prosecutors, and defense attorneys and heard back from about 20 counties. Most pre-exam conferences today involve the prosecution and defense only. In only a couple of counties (e.g., Ottawa) is the judge present. The victim attends regularly in only 1 county (Ottawa) and rarely in a second mid-state county. In one county the defendant is out of the room. In none of the jurisdictions does the district court magistrate conduct the pre-exam conference.

Based upon responses over the last month and earlier discussions in 2005-06, the pre-exam conferences that work the best have these in common:

- The prosecution discloses sufficient evidence so the defense can reasonably assess the case and consult with the client.
- Police reports and other documents in possession of prosecution are digital and can be and are transmitted to the defense electronically.
- Prosecutor at the PEC has latitude in plea bargaining.
- The PEC usually does not occur until a week after the arraignment.
- There is a level of trust and cooperation between prosecution and defense bar.

If any of those ingredients is missing – defense is handed the police report at time of the PEC, prosecutors do not readily disclose information to the defense, police/prosecution are not able to transmit documents electronically, the PEC is scheduled the same day as the preliminary exam, or the prosecutor has limited or no authority as to pleas – the PECs do not have the same resolution rate. Under the latter circumstances, defense attorneys have said they consider the PEC a waste of time.

"Probable Cause Conferences" (PCCs):

What does HB 5154 portend for "probable cause conferences" (PCCs)? Can the pre-exam conferences that have reasonable success continue under the new framework for PCCs? Quite possibly, yes. HB 5154 does not require a judge (or district court magistrate) or victim to be present. However, there is nothing in HB 5154 that ensures that PCCs will incorporate the current PEC practices that resolve a large number of cases early in the process to the mutual satisfaction of all stakeholders.

As of September 1, 2014, HB 5154 mandates the scheduling of "probable cause conferences". **Is that sufficient lead time?** Jurisdictions that now hold the PEC the same day as the prelim (like Kalamazoo) will have to change. Kent, Washtenaw, and St. Clair don't have PECs today. Kent and St. Clair want PECs, but judges or funding units won't go along – so they want this bill to mandate PCCs. Wayne County only uses PECs for non-prison felonies in 36D (Detroit). An attempt to extend PECs to 2 out-county courts was abandoned when the Wayne prosecutor's budget was cut. As a result, the whole PCC process will be new or a major adjustment for all stakeholders in those counties that have no experience with PECs or that will have to change practices to comply with HB 5154. How will Wayne County be prepared to comply for all felonies if it could not expand its use of PECs beyond minor felonies in 36D?

PAAM and its frequent ally MAC have admonished the Legislature on numerous occasions since the **Headlee** Amendment was adopted to the State Constitution in 1978 that a bill, program, or duty would constitute a mandated increase in the level "of any activity or service beyond that required by existing [1978] law". **Does HB 5154 constitute a violation** of Const 1963, Art IX, Sec. 29? Note that, while it may be argued (and with some validity) that the PCC process will save many counties money in the long run, please note that in the 7 largest counties whatever the counties may save may cost more money for the cities and townships which fund the district court in districts of the third class. **Where is the fiscal analysis?**

Note that there is nothing in HB 5154 about determining "probable cause". That continues to be the function of a preliminary exam. The term "probable cause conference" is misleading and a misnomer. It is like the Legislature defining zero degrees Fahrenheit as "hot".

Victim Testimony:

HB 5154, as now worded, would allow the prosecution – unilaterally at the conclusion of the PCC – to immediately convene a preliminary examination for the sole purpose of taking the testimony of the victim.

The Committee should be aware that prosecutors in several jurisdictions today use the preliminary examination to either:

- preserve the testimony of the victim (especially in domestic violence cases to reduce the leverage of the perpetrator to pressure a victim not to testify at trial); or to
- start the prelim with the victim as the singular witness (to avoid having the victim return again for the prelim) and then postpone the prelim until additional witnesses can be subpoenaed.

PAAM, MDJA, and CDAM agreed to the change in HB 5154 that made testimony by the victim a part of the preliminary exam and not part of the PCC. I support the change.

A critical issue in negotiations between PAAM/MDJA and CDAM concerned whether defense attorneys would have access to or disclosure of sufficient relevant evidence (in possession of police or prosecutor) to conduct an adequate cross-examination of the victim that early in the process. PAAM resisted any reference to "discovery" (arguing that was a proper subject for court rules), contending that it would provide that information in any event. What PAAM offered as an alternative was viewed by CDAM as a cure worse than the disease. Therefore, the agreement was to leave the bill silent on this issue.

Notwithstanding CDAM's support of the HB5154 (H-1), other defense attorneys remain uneasy about the lack of assurance on discovery or disclosure before cross-examining a victim at this stage. That skepticism reflects current experience in some counties. Lack of disclosure may raise a Confrontation Clause issue. Time will tell how well this part of HB 5154 works.

There are two other considerations about the timing in HB 5154. One is that not all attorneys appointed to represent indigent defendants are appointed quickly, so a PCC within 1 week could put the defense at a further disadvantage. (Despite passage of HB 4529, 2012 PA 93, eff 7/1/12, to create the indigent defense commission to set standards for indigent defense services, the commission has not been appointed.) Second is that, of the 250+ convicted felons exonerated by the Innocence Project around the country, three-fourths of those cases involved mistaken identification of the alleged perpetrator by an eye-witness. Where the prosecutor's case involves identification of a stranger (as opposed to someone the victim knows), will early testimony by the victim increase the probability of a wrongful identification? I don't pretend to know.

HB 5155 – Authority of District Court Magistrates (DCMs):

The amendments in HB 5155 regarding the authority of district judges (Sec. 8311) and technical changes in Sec. 8511 are necessary for consistency with HB 5154.

Moreover, HBs 5154-55 now retain the status quo as to the authority of district court magistrates to accept pleas and impose sentences for crimes to current law in Sec. 8511. It is also an improvement that DCMs will not preside over the testimony of victims.

However, the new provision in **Sec. 8511(H) – allowing DCMs to conduct PCCs** – deserves some caution.

Most Magistrates are not attorneys. Many have been retired police officers. Not all districts have one. If the vast majority of PECs today are not conducted by elected attorney judges, why are we delegating that role to appointed non-attorney DCMs? **What training have they had or will they need in order to perform that task? Who is really ready to do that?**

District Court Magistrates were created initially by 1968 PA 154 to have limited duties (esp. regarding warrants and bail) that included sentencing for minor traffic and DNR misdemeanors as directed by the district judge but no adjudication of cases. They existed only in rural areas of the state (districts of the first class or second class). They did not exist in the large city-funded district court districts.

Over time DCMs have been allowed in city- and township-funded metropolitan districts, they hear and decide civil infractions, they may adjudicate small claims if attorneys, and additional responsibilities have been added. HB 5155 would add yet another task.

There are two further considerations.

Why are DCMs being given this task? It has been reported by an insider in the development of this "PCC" proposal that district judges (MDJA) are concerned that the weighted caseload formula for the JRR will not adequately reflect the time that a judge may spend conducing a PCC. Therefore, MDJA wants DCMs to conduct PCCs rather than judges. That may be an understandable rationale but is it persuasive? Is MDJA's concern ameliorated by the fact that victim testimony will now be part of the preliminary exam and not a separate process (PCC), or by the prospect that PCCs in some jurisdictions may look a lot like existing PECs where the judge is not involved?

Many of you are familiar with the concept of a "unified trial court". A unified trial court presumes that all judicial matters are fungible and can be equally decided by circuit, probate, or district judges and therefore we only need ONE trial court to resolve court cases (unless, of course, it is a court of claims matter). Interesting theory – except for the fact that there is already in place an "inferior" court system ("inferior" used in the constitutional sense of a lower court or tribunal) known by these labels: friend of the court referee, juvenile referee, or district court magistrate. (For purposes of the JRR and weighted caseload formula, these positions are also called "**quasi-judicial officers**".) In an ever-increasing percentage of cases, referees or magistrates are finding facts, adjudicating the matter, making decisions, and determining dispositions. Sometimes these decisions are characterized as "recommendations" that a judge must approve before the "recommendation" is final. What percentage of recommendations is not approved? There is no claim whatever that there are rogue QJOs. To the contrary, they are doing what the judge to whom they report wants. But it also means the reality is quasi-judicial officers are the only court official that litigants see and their decision is the decision of the case. That trend is being facilitated by SCAO under the guise of efficiency, cost savings, and "right-sizing" and by the elimination of judgeships in courts whose caseload cannot be disposed of without the creation of additional QJO positions. Query whether the use of QJOs – appointed officers or employees of the court – conflicts with Const 1963, Art VI, which in 12 sections refers to elected judges and begins with Sec. 1, which states:

> "The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.".

HB 5155 would be another extension of the authority of DCMs for wrong reasons. In my opinion, that is an unwise precedent.

Respectfully,

Bruce A. Timmons

14hb5154&5155-030414-bt
bat march 3 2014